Ryder Truck Rental, Inc. *and* International Brotherhood of Teamsters, Local Union No. 118, Petitioner. Case 3–RC–10665

September 30, 1998

## DECISION AND DIRECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held March 31, 1998 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 11 for and 9 against the Petitioner, with 2 challenged ballots.

The Board has reviewed the record in light of the exceptions<sup>1</sup> and briefs, and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

The hearing officer found that Jay Preston is a supervisor within the meaning of Section 2(11) of the Act, and recommended that the challenge to Preston's ballot be sustained. The Employer excepts, contending that Preston's involvement in discipline is limited, and that, in assigning work or overtime, Preston is merely a conduit for management and does not exercise independent judgment. We find merit in the Employer's exceptions.

The Employer operates a truck rental business. Jay Preston's job title is "Technician in Charge" (TIC). He reports directly to Dave Chase, the service team leader (STL). TICs control work flow, answer telephone calls, and take care of customer concerns.

The hearing officer found Preston to be a supervisor because the hearing officer concluded that he disciplines, directs, and assigns work and overtime to other employees, using independent judgment, within the meaning of Section 2(11) of the Act.<sup>2</sup> Contrary to the hearing officer, we find that the Petitioner has not met its burden of proving that Preston possesses supervisory authority within the meaning of Section 2(11).

Initially, we find that the Petitioner has failed to show that Preston independently disciplines other employees. Both Supervisor Chase and Customer Service Manager Jeff Ferreri, who was broadly credited by the hearing officer, testified without rebuttal that the role of the TICs in the disciplinary process is essentially reportorial. According to Chase, when a potential disciplinary issue

arises, the TIC usually would come to him and describe the situation and discuss it with Chase. Then, Chase testified, "the ultimate decision would be for me to research it from there, and make a decision as to if something further ahead needs to be done." When shown records of verbal warnings issued by Preston, Chase again testified that such warnings are, for the most part, "just communication between the technician in charge and myself, the service team leader. He's the eyes and ears for me." Chase stated that if he receives such a record, he looks it over, asks the TIC what the problem was, and decides whether any further investigation is needed. Ferreri testified to the same effect. According to both Chase and Ferreri, then, the TICs have only the authority to issue verbal warnings to employees for conduct that may warrant discipline and to report such conduct to Chase, who then investigates further if necessary and determines what, if any, discipline is warranted. Such limited authority on the TICs' part is not supervisory authority within the meaning of Section 2(11).<sup>3</sup>

The other record evidence is consistent with the testimony of Chase and Ferreri. To begin with, Preston testified that he has no authority to impose any level of discipline above a verbal warning, and that if an employee was doing a poor job or behaving badly, he would write a memo and put it on Chase's desk (and, in extreme cases, speak to the employee as well). The memo would simply state the factual situation; it would not include a recommendation of what should happen to the employee. Although the hearing officer broadly discredited Preston, he did not discredit this testimony.<sup>4</sup>

The record also shows four instances in which Preston issued verbal or written warnings to employees. Three of these warnings were merely records of verbal instruction which neither recommended discipline nor put the employees on notice that discipline would ensue in the event of additional infractions. Such reports of substandard performance, which do not affect the employee's status or contain recommendations for discipline, are not evidence of supervisory authority.<sup>5</sup>

The fourth warning issued by Preston did state that employee Mike Gay would be suspended for 3 days without pay if the misconduct recurred. The authority to issue such a warning, which clearly affects the employee's employment status, is disciplinary authority within the meaning of Section 2(11), if the individual

<sup>&</sup>lt;sup>1</sup> In the absence of exceptions, we adopt pro forma the hearing officer's finding that David Reynolds is not a supervisor.

<sup>&</sup>lt;sup>2</sup> Sec. 2(11) of the act defines the term "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

<sup>&</sup>lt;sup>3</sup> See Passavant Health Center, 284 NLRB 887, 889 (1987).

<sup>&</sup>lt;sup>4</sup> Preston's testimony is also consistent with the testimony of TIC Dave Reynolds, who stated that he lacked the authority to impose discipline at all. Apparently in reliance on this and other testimony, the hearing officer found that Reynolds was not a supervisor.

<sup>&</sup>lt;sup>5</sup> Passavant Health Center, supra at 889. Employee Sam Rivituso testified that, when Preston gave him one of those verbal warnings (for complaining about a job assignment), he also told him he would be "written up" if he repeated the offense. Rivituso did not testify as to who, according to Preston, would write him up or what, if any, implications being written up would have had for his employment status.

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who issues the warning uses independent judgment in doing so.<sup>6</sup> According to Preston's uncontested testimony, however, a supervisor directed him to write that particular warning. Again, although he was unimpressed generally with Preston as a witness, the hearing did not discredit Preston's testimony concerning the warning to Gay; in fact, he did not mention this aspect of Preston's testimony in his report. Thus, even though Preston's demeanor did not favorably impress the hearing officer, there is nothing in the record which contradicts Preston's testimony, which was generally consistent with the statements of other witnesses.

On the basis of the foregoing, we conclude that the hearing officer must, at least implicitly, have credited Preston's testimony concerning the warning to Gay. Contrary to the dissent, we do not make this finding merely because the hearing officer did not expressly discredit that testimony. Under all the circumstances, however, we are comfortable in drawing the inference. As we have already noted, Preston's testimony in this regard is not simply unrebutted. It is also consistent with the testimony of both Chase and Ferreri and with other parts of Preston's testimony that were also consistent with Chase and Ferreri's testimony. Moreover, the warning to Gay, if actually issued by Preston independently of higher management, would have been the strongest single piece of evidence in support of the hearing officer's finding that Preston is a supervisor. To shore up that finding, all the hearing officer had to say was, "Although Preston testified that a supervisor told him to issue the warning to Gay, I do not believe him." But he did not. He did not mention the warning to Gay at all. In our view, the hearing officer's failure to cite what would have been the best evidence that Preston possesses 2(11) supervisory authority plausibly reflects that he (perhaps reluctantly) believed Preston when he testified that a supervisor had instructed him to issue that warning. In sum, we conclude that the evidence viewed as a whole does not substantiate the hearing officer's finding that Preston independently disciplines employees.

Also corroborated by Chase and Ferreri is Preston's testimony that he does not assign work independently. Instead, Chase creates a planning sheet, which contains a listing of jobs assigned to individual employees. Preston follows these assignments unless presented with an unanticipated job that needs to be handled, in which circumstance he chooses a technician to perform the work on the basis of Chase's prior assessment of the employee's special skills or training. Assignment of work by area of expertise does not involve the exercise of independent judgment when carried out according to instructions of management.<sup>7</sup>

Similarly, the record does not establish that Preston exercises independent judgment in assigning overtime. If a project must be completed on a particular day and cannot be finished by the end of the shift, Preston can ask an employee to work overtime within stated budgetary limitations. To assign overtime, Preston will first ask the employee already working on the project if he wishes to continue, but he has no authority to require the employee to remain. If that employee is unavailable for overtime, Preston will ask other employees, taking into account, where applicable, Chase's evaluation of their relative skills and expertise, and otherwise approaching them at random. We find no exercise of independent judgment by Preston in either the decision to assign overtime or in the choice of employees to work overtime; whatever judgment is exercised in this regard is exercised by management, not by Preston.

Contrary to the hearing officer, then, we conclude that while Preston exercises some authority on behalf of management in carrying out his duties, the Petitioner failed to establish that he exercises independent judgment in performing such duties. The factors relied on by the hearing officer, when reviewed in the light of the record, do not establish the existence of supervisory status. The record also indicates that Preston has no authority to hire, discharge, lay off, recall, reward, promote, or evaluate employees, or to grant them time off, or to effectively recommend such actions. We therefore find

<sup>&</sup>lt;sup>6</sup> Biewer Wisconsin Sawmill, 312 NLRB 506, 507 (1993).

<sup>&</sup>lt;sup>7</sup> See Quadrex Environmental Co., 308 NLRB 101 (1992).

<sup>&</sup>lt;sup>8</sup> We further find that the secondary indicia of supervisory status relied on by the hearing officer, such as ratio of employees to supervisors and employees' perception that Preston is a supervisor, do not establish supervisory status. See *Northcrest Nursing Home*, 313 NLRB 491, 498–499 (1993); and *McCullough Environmental Services*, 306 NLRB 565, 566 (1992). Although, as the dissent notes, Preston is the highest ranking individual at the facility for some 30 hours a week, it does not follow that if he is not a supervisor, the employees on his shift are not supervised during those periods. Chase testified that he is on call 24 hours a day, that he is called an average of 3 to 4 times a week, usually by the TICs, after he has left the facility, and that he also calls in to the facility once or twice a week. Thus, although Chase is not physically present during much of the evening shift, he is always available telephonically.

In finding the TICs to be supervisors, our dissenting colleague relies on their evaluations of other employees with regard to wage increases and their recommendations concerning hiring. We disagree on both counts. Neither of those factors were relied on by the hearing officer, and with good reason. Although the TICs do have input in the evaluations of other employees, there is no evidence that in connection with those evaluations the TICs make any recommendations whatsoever regarding pay increases. Moreover, Ferreri testified that he has disagreed with TICs' assessments and has repudiated them. He further testified that the TICs have high credibility, but that "[y]ou don't take anything for granted. Everything needs to be investigated to insure that it's true." The TICs' evaluations thus are not necessarily accepted, and in any event are not acted on without independent investigation by management, and therefore do not constitute 2(11) supervisory authority. Passavant Health Center, 284 NLRB at 891; Ten Broeck Commons, 320 NLRB 806, 813 (1996). As for hiring, although the TICs sometimes participate in interviewing candidates for employment and offer their opinions or recommendations, Chase also interviews such applicants. Where supervisors like Chase participate in the interview process, it cannot be said that employees whose status is at issue have

that the Petitioner has not shown that Preston is a supervisor, and we shall overrule the challenge to his ballot. 10

Accordingly, as the challenges to the ballots of Reynolds and Preston are overruled, and as these ballots are sufficient in number to affect the results of the election, we shall direct the Regional Director to open and count their ballots, to prepare a revised tally of ballots, and to issue the appropriate certification.

## DIRECTION

IT IS DIRECTED that the Regional Director for Region 3 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Jay Preston and David Reynolds. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I would affirm the decision of the hearing officer (HO) and find that Technician in Charge (TIC) Preston is a supervisor under Section 2(11) of the Act.

It is clear that Preston gave a written warning to an employee that the employee would be suspended for three days without pay if certain misconduct occurred. My colleagues concede that the authority to issue such a warning is disciplinary authority within the meaning of Section 2(11). However, they contend that an admitted supervisor directed Preston to write that warning. The contention is without merit. Although Preston so testified, the HO broadly discredited Preston. My colleagues nonetheless reach the conclusion that the HO credited this single aspect of Preston's testimony. I would not reach this conclusion. Given the HO's broad discrediting of Preston, and the HO's ultimate conclusion of supervi-

authority to effectively recommend hiring within the meaning of Sec. 2(11). Waverly-Cedar Falls Health Care, 297 NLRB 390, 392 (1989).

sory status, it is difficult (at best) to reach the conclusion that the HO *credited* Preston in this regard.

Perhaps aware of the aforementioned problem, my colleagues seek to show that Preston's testimony in this respect was corroborated. However, no one other than Preston testified that he was told to issue the warning. There is only the testimony that others in the managerial hierarchy are the persons who decide the question of suspension. But, clearly, this is not inconsistent with the supervisory authority to effectively recommend suspension. That is, in the instant case, Preston would recommend suspension if another infraction occurred, and such recommendation would be effective.

In sum, I would not reach the strained conclusion that the HO credited Preston in the above respect. At the very least, I would remand to have the HO resolve that credibility issue.

In finding supervisory status, I also rely on the fact that TICs prepare evaluations of employees, and these evaluations are relied upon by those who make decisions regarding wage increases. The fact that a decision-maker has the power to reject a recommendation, upon independent inquiry, is not inconsistent with the authority to effectively recommend. Inherent in any hierarchical system is the notion that the decision-maker is free to reach his/her own independent decision. The authority to recommend does not mean that the decisionnmaker will be a rubber stamp.

Further, TICs interview applicants and make recommendations concerning hire. The Employer gives "significant" weight to these recommendations. The fact that a higher official also participates in the process of interviewing and hiring does not detract from the TIC's authority in these areas.

Finally, I rely upon the secondary indicia of supervisory status. Preston is the highest ranking person at the facility from 6 to 11:50 p.m. each night. There are five-six employees on duty during these hours. If Preston is not a supervisor, these employees would be unsupervised for 30 hours each week.

<sup>&</sup>lt;sup>10</sup> Because we find that Preston is not a supervisor, we find it unnecessary to pass on the Employer's exceptions to the hearing officer's exclusion of evidence concerning the duties of TICs at other facilities or to his failure to consider the Board's treatment of leadmen in other cases involving the Employer.